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Supreme Court of the United States

OCTOBER TERM, 1950

No. 650

CARL E. RING,

Petitioner,

against

HAROLD SPINA, EDWARD HEYMAN, WALTER HANNAN and THE AUTHORS' LEAGUE OF AMERICA, INC.,

Respondents.

BRIEF FOR THE AUTHORS' LEAGUE, RESPONDENT

We submit that none of the issues presented by petitioner is of such a character as to warrant review by this Court. The petition does not claim that the decision of the Court of Appeals is in conflict with that of any other such court, or of this Court. Nor is there a claim that the decision presents any issue of general importance or novelty. Petitioner claims only that the Court of Appeals was wrong in holding: 1) that the District Court's charge was correct; 2) that the District Court properly withheld an item of $1,500 from the jury; and 3) that in the exercise of discretion the District Court improperly issued an injunction. The decision of the Court of Appeals applied well-established rules of law to the specific questions presented.

Petitioner is wholly in error in stating (p. 3) that that Court sustained a finding that the activities of the Authors' League (through its Dramatists Guild) were illegal. On the contrary, it expressly stated it was not passing on this question:

> "• • • On the other hand the League is naturally concerned that it shall not be held to be a conspiracy

in violation of the Anti-Trust Acts. It vigorously protests its innocence and its beneficence; it is conscious of no wrongdoing, and asserts that its existence is essential to the protection of authors and composers. Such purposes would of course not protect it, if it is in fact a combination in restraint of trade or an attempted monopoly; but they are relevant in deciding whether we should decide issues in which the plaintiff has only the most shadowy interests. We hold therefore that the judgment should not have decided that, if the authors revive the play they must give the plaintiff an opportunity to 'produce' it on an equal footing with anyone else, and that it should have contained no injunction. However, we hasten to add that we leave open all legal questions which such issues involve; we wish to make it entirely clear that we are not to be understood either to throw any doubt upon, or to affirm, what we said when we granted the temporary injunction; we merely decide that the necessity for such affirmance does not arise" (p. 380).

The Nature of the Case

Plaintiff Ring (petitioner here) sought to recover from the Dramatists' Guild and the authors of a play, losses which he claimed to have sustained on the theory that a contract which the Guild had negotiated with theatrical producers (known as the M.B.A.) contained provisions which violated the Sherman Act. He also sought injunctive relief. The play closed during out-of-town tryouts for various reasons, one of which was a dispute between Ring and the authors about changes in the play. The Guild did not participate in that dispute nor in the closing of the play. The jury found the Guild had not caused any losses which plaintiff claimed he sustained.

The Facts

"Stovepipe Hat" was a musical play about Abraham Lincoln written by the defendants Spina, Heyman and Hannan (Finding 3, p. 346). On February 7, 1944, the authors entered into a contract with one Gaumont for the

production of the play, the terms being those set forth in the M.B.A. (Findings 5, 6, pp. 346, 347), a form of agreement which the Guild had negotiated with producers (Finding 23, p. 350). In addition and coincidentally therewith, Spina and Gaumont entered into two separate and distinct letter agreements by the terms of which Gaumont hired Spina as general supervisor of the artistic and musical phases of the production (Finding 7, p. 347).

These separate agreements, wholly unrelated to the M.B.A., also gave Spina rights in a "different capacity" than those he had under the M.B.A. and entitled him to exercise "greater supervision and control than playwrights have under the M.B.A." (Finding 8, p. 347).

On March 13, 1944, Ring became Gaumont's partner by contributing $25,000, and by May 4, 1944, his total investment had reached some $57,000 (Findings 9, 10, p. 347). As Gaumont seemed unable to obtain the money needed to finance the production, Ring commenced an action against Gaumont in the United States District Court "to acquire sole ownership of the Ring-Gaumont partnership and to enjoin Gaumont from interfering with the further production of 'Stovepipe Hat'" (Finding 13, p. 348; Defendant's Ex. A, pp. 305-309). Six days later, Ring and Gaumont entered into a stipulation of settlement "whereunder Gaumont assigned to Ring all of his rights of every kind in the various contracts previously entered into for the production of 'Stovepipe Hat'" (Finding 14, p. 348; Plaintiff's Ex. 6, pp. 280-283). Included, of course, were Spina's contracts as general supervisor of the play. And Ring expressly assumed *all* the contracts (p. 281).

During tryouts in New Haven and Boston, Ring manifested dissatisfaction with many elements in the show. For example, he told Helen Tamaris, the choreographer, that the dances were "un-American" (S. M. 235, 1551). He testified that he had become dissatisfied with Ross, the director (S. M. 236-238). He testified also that the show was a failure because Spina was incompetent (S. M. 357, 358). Although the play had opened under the title "Stovepipe

Hat", Ring changed its name to "Johnny Drummer" at the suggestion of a member of the cast (S. M. 331, 332). To this Heyman, one of the authors, objected because the name did not suggest the subject matter of the play (S. M. 715).

There appear to have been frequent altercations between Ring and others concerned with the production, including Spina. Ross, the director, testified that the attitude of Ring was not one of cooperation, as was to be expected of a producer, but was one of dictation (S. M. 1590).

Spina, testifying at length about his difficulties with Ring during the tryouts, stated that Ring had tried to prevent him from coming to the tryout in Boston at all, and that after he arrived there he had told him to get out of the theatre (S. M. 1366-1384). Ring, himself, admits that he told Spina "to go out front" (S. M. 243, 245). After this Spina left Boston and on May 25th sent a telegram to Ring claiming that his contracts had been breached (Plaintiff's Exhibit 11, p. 296, Finding 17, p. 349). Two days later Ring closed the play (Finding 18, p. 349).

At the time of closing, the salaries of the director and the choreographer and the current bills were unpaid (S. M. 493-498). The cast, which was to be paid each Saturday night, was not paid on the Saturday night of the closing, although Ring knew that the cast was to be paid on Saturday night and admitted that he did not have the money in Boston (S. M. 502).

Ring admitted that at the time of the closing of the show he had only a small amount in his personal bank account (S. M. 417, 420). As the Court found, Ring took no steps to produce the play at any time after he closed it on May 27th, 1944, and he disposed of the costumes and scenery (Finding 20, p. 349).

When the authors sought an arbitration of their controversies with Ring he brought this suit claiming that the M.B.A. was illegal because various of its provisions violated the Sherman Act. The issues involved in this contention are important and interesting but will not here be discussed because they were not decided by the Court of Appeals.

Argument

We submit that petitioner has no ground for complaint. The jury found against him on the very issue he agreed should be submitted: "The question of causation and damages" (p. 376); there is no basis for any complaint about the charge. The Court of Appeals properly vacated the injunction. And the $1,500 item was properly withdrawn from the jury.

POINT I

The injunction was properly vacated.

The Court of Appeals, finding that there was no probability that petitioner could again be affected by the alleged illegal conspiracy, found it unnecessary to determine whether it was, in fact and in law, illegal, and concluded, in the exercise of a sound equitable discretion, that there was no occasion for the issuance of any injunction. It supported its conclusion with numerous authorities. Petitioner has not attempted to challenge any of them.

He seeks to overcome the finding of the Trial Court that, except for this one venture, "he never was and is not now engaged in the business of producing plays" (p. 346), which was accepted by the Court of Appeals (p. 380), by reference to some statement in a mandamus petition not part of the present record. But this case must be decided on the basis of the testimony given at the trial.

Ring had no connection with the theatre and knew nothing about show business (S. M. 304). As a matter of fact, in his testimony he admitted:

> "I saw 'Show Boat' in 1932 and I don't think I saw a show from then until this thing started" (S. M. 300).

Surely the question of this injunction raises no issue of sufficient general public importance to justify this Court's intervention.

POINT II

Petitioner can claim no rights in the play.

Petitioner's discussion of this subject (pp. 7, 8) incorrectly suggests that it had some bearing on the issue of damages. That, however, is not the case. In colloquy between the Court and counsel it was agreed that the question of damages should be submitted to the jury on the assumption that plaintiff had no further rights in the play. And the Court so instructed the jury (p. 220)—to which, of course, no exception was taken. So we have here no question of "apportionment" of damages as suggested by petitioner (p. 8) and *Bigelow* v. *R.K.O.*, 327 U. S. 251, is wholly inapposite.

Moreover, this issue has nothing to do with the propriety of injunctive relief. Indeed, petitioner at the trial asked Judge Rifkind merely to leave the question open for possible adjudication in some other litigation! (p. 339). Naturally the Judge refused to do this. And with that conclusion there can be no reasonable disagreement.

Petitioner is in error in suggesting (p. 7) that the decision against his having any interest in the play rested on his having signed the M.B.A. It rested on the fact that what he obtained (by assignment from Gaumont) was a production contract which incorporated the M.B.A. As the Court of Appeals properly pointed out (pp. 377, 378), if the M.B.A. was illegal then no part of the contract could survive. Absent the terms fixed by the M.B.A. there were no terms—there was no meeting of the minds—no contract.

POINT III

There were no errors in the Court's charge.

a. Petitioner's first contention (p. 9) that it was error to permit the jury to pass on the issue of the Guild being

a labor organization is academic at this time since the jury found in his favor. Of course, the Guild has always claimed that it was entitled to a directed verdict on that subject, but it is unnecessary to discuss this contention now because the Court of Appeals did not pass on it.

b. There is no basis for petitioner's criticism of the charge as to damages (pp. 10, 11).

Petitioner has now concentrated on one single point, namely, an observation made by Judge Rifkind by way of illustration only contained in the following extract from the charge:

> "If this play collapsed like a balloon because it only had a few weeks' life in it, and it died a natural death, then there was no causal relationship between the violation of the law and the loss of Ring's money. If Ring got tired of the play, and decided that he had enough of it, didn't have enough money, or whatever the reason was, and put a pin into it, then there was no causal relationship between the violation and the loss of Ring's money" (p. 218).

Is Ring seriously contending that Judge Rifkind committed reversible error because there is no testimony to the effect that the play collapsed like a balloon and no witness said that the play "died a natural death"? Obviously, the use of this illustration did not have to be founded on precise testimony.

Reading the charge as a whole, and not piecemeal, it can be seen that the Court made it abundantly clear to the jury that if the illegal acts of the defendants caused the closing of the play, they would be responsible in damages. In four different portions of his charge, Judge Rifkind affirmatively stated the conditions under which the jury must find for plaintiff (see pp. 216, 217, 218, 219).

We doubt that it is necessary to reply to these objections at any length. It is elementary that a judge may comment upon the evidence and express his opinion on facts. As Mr. Chief Justice Hughes said in *Quercia* v. *United States*, 289 U. S. 466, at page 469:

"* * * In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted in their determination. *Carver* v. *Jackson,* 4 Pet. 1, 80; *Vicksburg & Meridian R. Co.* v. *Putnam,* 118 U. S. 545, 553; *United States* v. *Philadelphia & Reading R. Co.,* 123 U. S. 113, 114; *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 13, 14; *Patton* v. *United States,* 281 U. S. 276, 288 * * *."

POINT IV

The $1,500 item was properly withdrawn from the case.

The petition (pp. 11-14) has dealt with this issue in a manner so confused and confusing that we believe it essential to state its real character. In the first place, there has been no decision whatever on petitioner's right to get this money, but merely a decision that it was not properly part of this anti-trust suit (pp. 375-376). Surely this Court should not concern itself with such an issue.

The question arose out of the settlement of Ring's action against Gaumont. The latter had deposited $1,500 with the Guild for the benefit of Spina and the other authors in order to obtain a postponement of the production (p. 343). The stipulation of settlement assumed that Gaumont would get the money back from the Guild and when repaid it would be credited on the amount of $6,659 which Ring had agreed to pay Gaumont (p. 282).

When the Guild was asked by Spina to return the $1,500 to Gaumont, it prepared and sent to Spina a memorandum. While the settlement stipulation contemplated that Gaumont (not *Ring*) would get this money back, the authors for whose benefit the money had originally been deposited

were not parties to that settlement agreement. Consequently, the status of that deposit and its return was left vague, and the Guild quite properly requested that a document be signed by all the parties instructing the payment of the money to Gaumont (Exhibit P, pp. 313, 314). That was never done (p. 344).

The subject of this claim was discussed at length at the trial between counsel and the Court (pp. 187-192). In his charge to the jury (p. 220) the Judge took this issue out of their hands. Petitioner took no exception to that action by the Court (pp. 222-227). Moreover, he at no time requested the Court to direct a verdict in his favor with respect to the $1,500 (see S. M. 1793, 1799).

Most of petitioner's argument on this head (e.g., pp. 13, 14) proceeds as if this were an action for money had and received. In that event his observations with regard to suit being a sufficient demand might be relevant. But then the action of the Trial Court in severing this claim was in exact accordance with the stipulation of the parties (p. 352). And if this claim be part of the anti-trust suit it was properly excluded from the jury's consideration because there was no proof that the alleged conspiracy in any way contributed to the withholding of the money; that there was a demand by petitioner that it be returned to him and a refusal based on the agreement.

Besides, if petitioner claims the $1,500 because it was part of his investment in the venture, as his counsel appears to have done (p. 274), then it would seem that he was precluded because the jury found that the losses which he sustained were not caused by any illegal acts of the Guild.

POINT V

Nothing was left undecided.

Petitioner claims (pp. 15, 16) that he was entitled to a decision on his motion for a new trial. But he has had such decision. For obviously the entry of judgment against his claim to be entitled to damages is such decision. Moreover, as we have seen, petitioner did not ask for a directed verdict on the issue of damages, but on the contrary agreed that it be left to the jury. Nothing has been set forth to show any reason why there should be a new trial on that issue.

There is nothing in *Montgomery Ward* v. *Duncan*, 311 U. S. 243 (p. 16), that is here relevant. There defendant had moved for a directed verdict and then, in the alternative, for judgment notwithstanding the verdict or a new trial. The District Court acted on that motion and gave judgment for defendant. The Circuit Court of Appeals reversed and directed judgment for plaintiff. This Court held only that, under these circumstances, defendant was entitled to have the District Court exercise its discretion whether or not there should be a new trial—that the issue survived the reversal. Here, however, there has been an affirmance and nothing has survived.

CONCLUSION

We submit that no reasons exist for allowing the writ.

Respectfully submitted,

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